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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 THOMAS HORNE,

10 Plaintiff,

11 v.

12 NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

13 Defendant.

CASE NO. 3:17-CV-05861-DWC

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS

14 Plaintiff Thomas Horne, proceeding *in forma pauperis* with retained counsel, filed this
15 action allegedly challenging the final decision of the Acting Commissioner of the Social Security
16 Administration ("Commissioner"), which denied him disability insurance benefits ("DIB"). *See*
17 Dkt. 4. Currently before the Court is Defendant's Motion to Dismiss, which requests the Court
18 dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). Dkt. 7, 8.
19 Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73, and Local Rule MJR 13,
20 the parties have consented to have this matter heard by the undersigned Magistrate Judge. *See*
21 Dkt. 2.

22 The Court concludes it lacks jurisdiction to review the Commissioner's decision.
23 Accordingly, the Court grants Defendant's Motion to Dismiss.
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Under Federal Rule of Civil Procedure 12(b)(1), a party may move for the dismissal of a case for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12. The court must dismiss a complaint under Rule 12(b)(1) if, viewing the factual allegations in the light most favorable to the plaintiff, the underlying action: (1) does not arise under the Constitution, laws, or treaties of the United States, or does not fall within one of the other enumerated categories of Article III Section 2 of the Constitution; (2) is not a case or controversy within the meaning of the Constitution; or (3) is not one described by any jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962); *see also* 28 U.S.C. § 1331 (federal question jurisdiction).

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“Cases arising under the Social Security Act generally are not subject to review unless they challenge a “‘final decision of the Secretary made after a [statutorily mandated] hearing.’” *Dexter v. Colvin*, 731 F.3d 977, 980 (9th Cir. 2013) (quoting *Califano v. Sanders*, 430 U.S. 99, 108 (1977)). The Commissioner may apply administrative res judicata “to bar reconsideration of a period with respect to which she has already made a determination, by declining to reopen the prior application.” *Lester v. Chater*, 81 F.3d 821, 827 (9th Cir. 1996). Once an administrative decision becomes final, the Commissioner’s decision to reopen a disability claim is “purely discretionary.” *Taylor v. Heckler*, 765 F.2d 872, 877 (9th Cir. 1985). Because a discretionary decision is not a “final decision” within the meaning of 42 U.S.C. § 405(g), the Commissioner’s refusal to reopen a decision “is not a ‘final’ decision subject to judicial review.” *Id.* (citations omitted); *Lester*, 81 F.3d at 827 (“As a general matter, the Commissioner’s refusal to reopen her decision as to an earlier period is *not* subject to judicial review.”).

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1 to judicial review.” *Lester*, 81 F.3d at 827. However, “where the discussion of the merits is
2 followed by a specific conclusion that the claim is denied on res judicata grounds, the decision
3 should not be interpreted as re-opening the claim and is therefore not reviewable.” *Krumpelman*
4 *v. Heckler*, 767 F.2d 586, 589 (9th Cir. 1985) (citing *McGowen v. Harris*, 666 F.2d 60, 68 (4th
5 Cir. 1981)).

6 Here, the ALJ, applying the doctrine of *res judicata*, denied Plaintiff’s request for a
7 hearing regarding his April 7, 2014 application. Dkt. 8, p. 9. The ALJ noted that Plaintiff
8 previously filed applications for DIB and supplemental security income (“SSI”), which were
9 denied on May 17, 2012. *See id.*; *see also* Dkt. 9, Chung Dec., ¶ 4(a). The ALJ stated he
10 compared the evidence considered in reaching the May 2012 determination with the evidence
11 relating to Plaintiff’s 2014 claim. Dkt. 8, pp. 9-10. “Based on this comparison,” the ALJ found
12 there was no new or material evidence and determined the doctrine of *res judicata* applied to
13 Plaintiff’s 2014 claim. *Id.* at p. 10. “Because the doctrine of *res judicata* applie[d],” Plaintiff’s
14 request for a hearing was denied. *Id.*

15 As the ALJ’s July 2015 decision was a decision declining to reopen Plaintiff’s previous
16 claims, this is not a “final decision.” Plaintiff does not allege his due process rights were
17 violated. *See* Dkt. 4. Additionally, Plaintiff does not assert, nor does the Court find, the ALJ’s
18 decision was a “de facto reopening.” *See* Dkt. 4. The Court notes Plaintiff did not file a response
19 to Defendant’s Motion to Dismiss. The Court concludes it does not have jurisdiction to review
20 the ALJ’s July 1, 2015 decision declining to reopen Plaintiff’s previous applications and denying
21 Plaintiff’s request for a hearing.

1 **CONCLUSION**

2 As the Court lacks jurisdiction to review the ALJ's July 1, 2015 decision, Defendant's
3 Motion to Dismiss is granted.

4 Dated this 15th day of February, 2018.

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7 David W. Christel
8 United States Magistrate Judge
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